In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 727

GEORGE S. STAYNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial petitioner was found guilty on three counts of willful failure to file a timely income tax return for the years 1958, 1959, and 1960, in violation of § 7203 of the Internal Revenue Code of 1954. He was sentenced to concurrent six month prison terms on each of the counts. The court of appeals affirmed the conviction without opinion.

It is undisputed that petitioner's 1958, 1959 and 1960 income tax returns were not filed on time. All three returns were filed on May 24, 1962, after the Internal Revenue Service had sent three letters to petitioner (on June 27, 1961, January 2, 1962 and April 23, 1962) inquiring as to when and where he had

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filed his 1960 tax return (G.A. 1a–5a, 135a–137a; Tr. 662–680).[1]

Petitioner's defense at the trial was lack of wilfulness. He blamed his failure to file timely returns on the illness and neglect of his accountant and on his own preoccupation with his medical practice. However, it was shown that during the period in question petitioner had found the time to take several trips abroad. In February 1959, petitioner, his wife and another couple flew a private plane to Colombia, where they spent six or seven days (Tr. 326, 421). In September 1959, he spent about five days in Denver, Colorado (Tr. 325, 493). In January 1960, petitioner, his wife and his parents took a five-day trip to Cuba (Tr. 326, 421). In August 1960, petitioner took a trip to Geneva, Lausanne, Zurich, Venice, Rome and Florence which lasted approximately five weeks (Tr. 326, 425–427, 491). Moreover, in early 1961, he and five others invested in and helped organize a small company, Phoenix Aircraft Manufacturing Corporation, which was developing a new concept in aircraft design (Tr. 402–403, 458–461). Petitioner admitted on cross-

[1] The returns as eventually filed reflected the following figures (G.A. 5a–7a; Govt. Exs. 2, 3, 4):

Year	Gross income	Taxable income	Taxes due and owing	Taxes withheld	Payments on estimated tax
1958	$28,193.86	$10,383.41	$2,299.69	0	$300.00
1959	26,669.45	3,037.84	607.57	0	0
1960	30,859.82	10,930.11	2,441.83	0	0

The designation "G.A." refers to the Government's Appendix in the court below. The designation "Tr." refers to the transcript of proceedings at the trial.

examination that he was aware of the duty to file income tax returns and that he knew such returns were due on April 15 of each year (G.A. 102a, 126a–127a).[2]

The lower courts were correct. There is no conflict of decisions or other reason for further review.

(1) Petitioner argues that the trial judge violated the rule of *Bollenbach* v. *United States*, 326 U.S. 607, that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. In the case at bar the jury sent a note to the court indicating that one juror was confused as to whether petitioner was on trial for wilful failure to file returns or for wilful attempts to defraud the government of the tax (G.A. 159a). In response, the judge re-read to the jury those portions of his charge which related to the essential elements of the offense. After this was done the jury indicated that it was satisfied and the deliberations continued (G.A. 159a–163a). There was no error here; the court did exactly what it should have done. In the *Bollenbach* case, *supra*, the jury, after seven hours of deliberation, reported that it was hopelessly deadlocked. In response to a question put by the jury at that point the trial judge gave an erroneous "presumption" instruction which was in conflict with the presumption of innocence, and five minutes later a verdict of guilty was returned. There

[2] It was also undisputed that petitioner did not file timely returns for four earlier years, 1954 through 1957. The 1954, 1955 and 1956 returns were filed in 1958 (before any of the three returns involved in the instant case were due) and the 1957 return was filed on August 7, 1963 (G.A. 46a–47a, 90a–91a; Govt. Exs. 8, 9, 10, 14).

is no similarity at all between the instant case and *Bollenbach*. There was no equivocal or erroneous instruction here.

(2) Petitioner's second question (Pet. 7–8) relates to the propriety of permitting the government to show, on the cross-examination of petitioner, that he had kited checks. Such questioning was entirely proper, for petitioner had previously put his character in issue by calling ten character witnesses. *Michelson* v. *United States*, 335 U.S. 469, 476–479. (Since two of these ten witnesses were or had been associated with banks, petitioner appears to have been trying to create the impression that he enjoyed a good reputation generally and within the banking community—G.A. 12a–16a.)

(3) The trial court did not commit error in asking questions of petitioner and other witnesses. The record indicates that the court's sole interest was to understand and clarify the testimony, especially petitioner's which at times was very confusing. The fact that such questioning may have elicited testimony unfavorable to the defense provides no basis for holding that the trial judge abused his discretion. *United States* v. *Rosenberg*, 195 F. 2d 583, 594 (C.A. 2), certiorari denied, 344 U.S. 838; *Simon* v. *United States*, 123 F. 2d 80 (C.A. 4); *Hellman* v. *United States*, 339 F. 2d 36, 37–38 (C.A. 5); *United States* v. *Aaron*, 190 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827.

(4) Petitioner contends, finally (Pet. 8), that the trial judge showed partiality in that he failed to in-

struct the jury to disregard testimony to which petitioner's objections were sustained, but "when the Government's objections were sustained, the jury *was* instructed to disregard the testimony objected to." Petitioner has offered no record citations to support this allegation. Our reading of the transcript disclosed that there were two occasions on which the judge instructed the jury to disregard testimony (Tr. 133, 253) and that at no time did the defense ever ask for such an instruction.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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